

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 453  
5440582

BETWEEN

WAYNE WU  
Applicant

A N D

SKYCITY MANAGEMENT  
LIMITED  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Nathan Santesso, Advocate for the Applicant  
Kylie Dunn, Counsel for the Respondent

Submissions Received: 28 October 2014 from the Respondent  
30 October 2014 from the Respondent

Date of Determination: 5 November 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. The applicant, Mr Wayne Wu is ordered to contribute \$4,000 towards SkyCity Management Limited's costs.**

**The substantive determination**

[1] In a determination of the Authority dated 14 October 2014<sup>1</sup> the Authority determined that:

- The applicant, Mr Wayne Wu had not been constructively dismissed by the respondent, SkyCity Management Limited (Sky City).
- The issue of costs was reserved.

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<sup>1</sup> [2014] NZERA Auckland 424

[2] A memorandum as to costs was filed by Ms Dunn, on behalf of Sky City seeking a contribution of \$5,000 (including GST) towards its costs. Ms Dunn submitted that Sky City's costs to defend Mr Wu's unsuccessful claim significantly exceeded \$5000. In support of this claim, Ms Dunn submitted that Sky City had to produce detailed briefs of evidence from 4 witnesses, prepare substantial legal submissions and that the matter involved a full day hearing in the Authority. No invoices in respect of costs were produced by Sky City.

### **Without prejudice save as to costs**

[3] It was further argued on behalf of Sky City that on 14 February 2014, (7 months before the investigation meeting on 26 September 2014), an offer was made "without prejudice save as to costs" (the Calderbank offer).

[4] Sky City claim that the Calderbank offer of \$8000 along with a lifting of the trespass notice issued to Mr Wu was to fully and finally settle all matters with Mr Wu to avoid the costs of the hearing. The offer was declined by Mr Wu.

[5] Mr Wu opposes Sky City's claim for costs and says he agreed to pay \$3500.

### **Authority's power to award costs**

[6] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs on a principled basis.

[7] The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup>. Those principles were referred to by Ms Dunn for Sky City in support of costs against Mr Wu. The principles are so well recognised, I do not need to restate them. However, the following principles highlighted in *PBO* are particularly relevant to this case, namely:

- There is a discretion as to whether costs should be awarded and as to the amount.
- Equity and good conscience is to be considered on a case by case basis.

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<sup>2</sup> [2005] 1 ERNZ 808

- Costs are not to be used as punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account when inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event.
- "Without prejudice except as to costs" offers can be taken into account.

[8] The general principle is that costs follow the event, and I see no reason to depart from that in this case. Sky City was entirely successful in its defence of Mr Wu's claim and should be awarded costs.

[9] There is no evidence of total costs incurred by Sky City. Ms Dunn submitted that Sky City's costs significantly exceeded \$5000. However, no invoices were attached to support Sky City's costs claim so it is difficult for the Authority to determine whether such costs are reasonable.

[10] It is apparent from the documentation filed in the Authority by both parties regarding costs, that Sky City attempted to resolve the matter by making a Calderbank offer to Mr Wu which was declined.

[11] Mr Wu was not successful with his claim against Sky City and would, as it turned out, have achieved a better result by accepting the Calderbank offer made in February 2014.

[12] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union & Ors*<sup>3</sup> observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. I adopt that approach.

[13] The normal starting point for costs in the Authority is \$3,500 per day see *Fifita (aka Bloomfield) v. Dunedin Casinos Ltd*<sup>4</sup>. This matter involved an investigation

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<sup>3</sup> [2011] NZEmpC 13

<sup>4</sup> [2012] NZERA Christchurch 219

meeting of one full day. Sky City seeks \$5000 (including GST) towards its costs for the reasons set out above.

[14] It is my view that an uplift in the normal daily rate is warranted in the circumstances. A Calderbank offer was made by Sky City approximately 7 months before the Authority's investigation meeting, and was rejected by Mr Wu. Costs at the time the offer was made would not have been anywhere near the level reached following the investigation meeting. This is a relevant factor.

[15] Mr Wu has not produced any evidence regarding his costs or his financial circumstances to assist the Authority.

[16] Accordingly, I order Mr Wu to contribute \$4,000 towards the costs of Sky City.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**